(1) Supreme Court, U.S.
FILED

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No._____

In The

Supreme Court of the United States

LYNN GEREMIA AND JOHN GEREMIA

Petitioners,

v.

COLORADO BELLE CORPORATION AND
UNITED STATES INTERNAL
REVENUE SERVICE

Respondents,

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LYNN GEREMIA AND
JOHN GEREMIA
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70 pp

QUESTIONS PRESENTED

1. Was the Merit System (Pay for Performance) which resulted in Lynn Geremia's lower wage compared with other male bartenders with less seniority subjective enough to be valid?

2. Was it within the District Court's discretion to award Colorado Belle $84,028.90 in attorney's fees without being specific in it's order which alleges Geremia (Pro Se) was frivolous and the appeal taken in bad faith?

3. Could warning slips and threats of termination shortly after filing of the lawsuit in federal court be retaliatory actions upon protected activities?

4. Are the circumstances regarding warning slips given to Lynn Geremia facts for the 'trier of facts' to review?

5. Did Geremia produce evidence to support her punitive damages claim under state or federal law?

6. Did the District Court properly deny Geremia's motion to compel Colorado Belle to produce "All payroll records for bartenders" as too broad and irrelevant, in order to prove her Equal Pay Act Claim?

7. Upon review of the record, was Geremia's complaint administered with fairness and justly?

8. Did the District Court properly grant all of Colorado Belle's motions for Partial Summary Judgment?

9. Was the introduction of Section 7433(a) as amended by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 3102(a)(1)(A), 112 Stat. 730 valid enough to reverse United States Internal Revenue Service's Motion to Dismiss?

10. Did the Magistrate Judge Roger Hunt promote a fair and just administration of the complaint when he refused to recuse himself on motion by the plaintiff Geremia and erroneously called it a motion pursuant to 28 U.S.C. 455?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, The parties are:

Petitioners: Lynn Geremia and John Geremia, individuals in proper person.

Respondents: Colorado Belle Corporation and United States Internal Revenue Service.

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PETITION FOR WRIT OF CERTIORARI

LYNN GEREMIA AND JOHN GEREMIA, Petitioners, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This is a dispute in which Lynn Geremia alleges wage-based gender discrimination, violations of Racketeer Influenced Corrupt Organization Act, Equal Pay Act, Title VII gender discrimination and retaliation and intentional infliction of emotional distress. Lynn Geremia is alleging that Colorado Belle and the Internal Revenue Service are conspiring to violate tax regulations. On June 5, 2000, the district court granted Internal Revenue Service motions to dismiss based on Geremia's failure to state a claim upon which relief may be granted. On March 28, 2000, U.S. Magistrate Judge Roger Hunt denied Geremia's Motion to Compel "all payroll records for bartenders" on the grounds that the motion was overbroad and not relevant. Lynn Geremia is a bartender with the most seniority. On June 2, 2000, the district court granted Internal Revenue's motion to dismiss alleging IRS had sovereign immunity. To no avail Geremia appealed to the 9th Circuit stating 26 U.S.C. 7433(a) should prevent 'sovereign immunity'. On October 10, 2001, the district court granted Colorado Belle's motion for summary judgment on Geremia's Intentional Infliction of Emotional Distress, Punitive Damages and John Geremia's loss of consortium claim, alleging no material facts exist to support these claims.
On October 11, 2001, the district court granted Colorado

Belle's motion for summary judgment on Geremia's Civil Conspiracy Claim and Geremia's State and Federal RICO claims alleging Geremia misunderstood tax regulations and failed to show genuine issues of fact exist. Geremia contends that dismissal of Internal Revenue Service prevented adequate discovery. On October 30, 2001, the district court granted Colorado Belle's motion for summary judgment on Geremia's Equal Pay Act Claim, and Title VII Claims as well as Retaliation Claims alleging the merit system 'pay for performance' system was valid and actions of warning slips and threats were within Colorado Belle's discretion. Geremia contends that the 'pay for performance' is not subjective enough and offered case law from four appellate courts which may back Geremia's contentions. On April 16, 2002, after Geremia filed the appeal to the United States court of Appeals for the Ninth Circuit the district court awarded Colorado Belle attorney fees in the amount of $84,028.90. Geremia filed a motion to stay attorney fees and in the motion complained that there was no evidence of frivolous behavior by Geremia to the district court. The district court made a blanket assertion that Geremia was frivolous and the appeal was made in bad faith. Geremia enjoined their appeal of attorney fees with there Reply to Colorado Belle's Answering Brief to the 9th Circuit Court of Appeals. The 9th Circuit refused to revue the attorney fees dispute alleging Geremia failed to file a second 'Notice of Appeal'. Geremia contended that their brief titled '*Reply* to Colorado Belle's Answer and Appeal of order awarding $84,028.90 in attorney's fees to the Defendant' should be considered as a 'Notice' in Geremia's Motion for Rehearing En Banc to the Ninth Circuit, citing **Smith v. Barry** 502 U.S. 244. The 9th Circuit stated they did not agree with Geremia's contentions, and affirmed all the district courts orders, denying the En Banc Motion for Rehearing on April 30, 2003.

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JURISDICTION

Subject matter jurisdiction over the claims is found on 28 U.S.C 2000e, et.seq., Equal Pay Act, 26 U.S.C.. 29 U.S.C. 206 et seq., Racketeering Influenced Corruption Organization, 18 U.S.C. 1961 et. seq., and 28 U.S.C. 1367, 28 U.S.C. 1291.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

Title VII, United States Code 1983

STATEMENT OF THE CASE

Simply stated, this is a case where the plaintiff became aware that male bartenders were being paid more than her, even though she had the most seniority in her classification. Plaintiff filed an Equal Pay Act Claim against her employer Colorado Belle Hotel and Casino. In hopes to uncover the reasons for this and be compensated, she filed suit. She also filed against Nevada Equal Right Commission and United States Internal Revenue alleging violations of RICO as well as United State Tax Regulations.

From the very beginning she was treated with total disregard by the Defendant counsel as well as the court. Numerous examples of bias behavior by the court became evident:

1. First Defendant was forced to have her deposition taken before the 26f meeting in violation of Federal Rules of Civil Procedure.

2. There was improper ex parte communication between Colorado Belle counsel and Judge Roger Hunt.

3. Judge Hunt refused to recuse himself contrary to 28 U.S.C. 144, and in fact called the request to recuse a motion pursuant to 28 U.S.C. 455 which in fact this court knows is a self executing motion.

4. Judge Johnnie Rawlinson denied a motion to amend the complaint alleging the Plaintiff failed to attach their amended complaint. The record clearly shows this to be an untruth.

5. Judge Hunt signed defendant's Discovery Plan even though Plaintiff never attended the 26f discovery conference. The Plaintiff was not properly noticed for the 26f conference.

6. To add insult to injury Plaintiff attempted to file Judicial Misconduct charges with the 9th Circuit twice and each time even though Plaintiff had sent the Misconduct Charges via certified mail the 9th circuit denied that they had received them. All this created animosity and hard feelings amongst all parties including the court. This ultimately resulted in the unprecedented and outrageous award of attorney fees to the defendant of $84,028.90 even though Plaintiff is pro se and the court failed to be specific in it's 'blanket assertion' that Plaintiff was frivolous in filing the complaint.

The purpose in filing this complaint was because Lynn Geremia (bartender) became aware that male bartenders were being paid more than herself. Lynn Geremia is the employee with the most seniority both in experience and years on the job. She first came to work for the parent company Circus Circus in January of 1980 and transferred to the Colorado Belle and worked for that company from the day it first opened in 1987. She also felt that the employer and Internal Revenue Service are <u>forcing</u> employees including herself to

participate in a 'tip reporting procedure' that violates US Tax Regulations. This procedure is how Colorado Belle established the 'allocation figure' on the W-2. Which Colorado Belle and IRS have admitted is a guideline to be used to decide whether an employee is claiming a proper amount of tipped income.

The force is by threat, intimidation and auditing by Internal Revenue Service of those employees that objected. This is carried out by use of the US Mail and conspiracy (Criminal Enterprise). "The Secretary of the Treasury or the Secretary's delegate shall instruct employees of the Internal Revenue Service that they may not threaten to audit any taxpayer in an attempt to coerce the taxpayer into entering into a Tip Reporting Alternative Commitment Agreement."Pub.L. 105-206, title III, Sec. 3414, July 22, 1998, 112 Stat. 755

During the course of the administration of this complaint Lynn Geremia and John Geremia became aware of blatant bias, unfair and unjust behavior by the lower court.

John Geremia is an experienced Pro Se litigant knowledgeable in United States Codes and Federal Rules of Civil Procedure. He has taken some law courses at the University of Nevada, Las Vegas. Lynn Geremia has received a Jury Verdict and award in her favor against the Colorado Belle in the past in which she allowed a dismissal for extra money from the Colorado Belle. This complaint was in Nevada District Court for the State of Nevada. John and Lynn Geremia also received an out of court settlement of $27,500 from Colorado Belle in a second action. The case at bar is the third complaint the Geremias have filed against the Colorado Belle Hotel. Geremias felt it was important that this court is aware of prior legal actions they have had to take in regards to Colorado Belle, as this shows a

chain of conduct by the Colorado Belle as well as that these Pro Se litigants are not without experience.

The enormous and unprecedented amount of attorney fees against a pro se, warrants a review of this matter by the Supreme Court. This case will go out as a threat to other pro se litigants that might choose to file a federal action.

ARGUMENT

In regards to the orders of the court which required Co-plaintiff Lynn Geremia's deposition prior to a 26f discovery conference and order denying Plaintiffs' Motion to Compel Wage records.

Both the court and Defendant Colorado Belle relied on Local Rule 26-1(a) which ultimately forced Lynn Geremia to be examined by deposition prior to a 26(f) Discovery Conference. Long before this, Lynn Geremia had requested ' Any and all payroll records for bartenders since 1996 to present' yet the court chose to call these 'personal records' and focus on helping the defendant obtain Lynn's deposition first.

In Judge Roger Hunt's order Entered and Served on March 29, 2000. He states at page 9 lines 1 and 2

> ....This was a request for production of personal records of Defendant's. Defendant has an obligation to protect those records from the public exposure unless those employees consent otherwise.

Judge Hunt also states at last page of order;

> ...is to broad and **irrelevant. (emphasis added)** **ORDERED** THAT Plaintiffs' Motion to Compel(#8) is DENIED.

See attached hereto App. 36

How can a plaintiff pursue an Equal Pay Act Cause of Action without payroll records?

Circumstances like this throughout the administration of this complaint point to a blatantly bias behavior by the court.

In regards to the taking of plaintiffs deposition before the discovery conference;

This LR26-1(a) violates National Rules of Civil Procedure whereas:

In pertinent part....A local rule shall be consistent with-but not duplicative of- Acts of Congress and rules adopted under 28 U.S.C. 2072 and 2075.**FRCP 83(a)**. This court in purviewing Plaintiffs' Objection to Magistrate's Scheduling Order Filed on March 13, 2000(72)(a) is Defense attorney Cam Ferenbach's letter in which he states in pertinent part....

> While your reading of Fed. R. Civ P. 26(d) is correct, it is superseded by Local Rule26-~~1(a)~~ of the U.S. District Court for the District of Nevada.....

This court must agree that a Local Rule that causes National Federal Rules to be set aside is the opposite of a rule that is consistent with National Federal Rules. This in itself is enough to cause unjust and unfair administration of Plaintiffs' Complaint. In so doing the aforementioned the court violated Federal Rules of Civil Procedure 83(a). No place in the Local Rules does it expressly allow for the taking of primary evidence (a parties deposition) before the 26(f) meeting.

Even though Plaintiffs continued to beg all parties including the court for a 26(f) meeting first, the 26 (f) meeting took place without the plaintiff being noticed of it and a Stipulation Order drawn by the Defendants and signed by Judge Hunt was filed on 4/03/00. Obviously the Discovery Conference which was not properly noticed in which the Plaintiff were not allowed to attend was convened well after the 30 days

had elapsed in regards to LR 26-1-(a)(1), as defendant Colorado Belle filed their answer on 1/24/00.
In fact the only Notice of Discovery Conference ever filed with the court was Plaintiffs on 4/14/00 in a continued attempt to have a meeting of all parties.

Simply stated:

The motion practice and pleadings filed with the Court will show that Plaintiff served on the Defendant Colorado Belle Request for Production of Documents at the same time they served the Summons and Complaint. Defendants refused to comply even though the (payroll) records requested were Mandatory Disclosures. The Defendant instead chose to seek primary evidence (Lynn Geremia's deposition). First in orders Judge Hunt chose to call wage records, personal records. Failing this 'Judicial error' after Plaintiff was forced to file a well grounded Motion to Compel. He exposed an obvious 'Judicial Misconduct' pursuant to 28 USC 372, in his order filed on 6/6/00. In pertinent part Judge Hunt states at page 5 lines 6 and 7....

> Defendants have made a good faith effort to resolve the dispute by providing information Plaintiffs need....

Plaintiffs did finally receive some wage records BUT how did Judge Hunt find this out?

Furthermore in regards to 'Judicial Misconduct'28 USC 372

It is the Plaintiffs contention that Judge Hunt never should have administered this case. He had administered a case just a few months prior to this one. That case is also on appeal to the Supreme Court. In this case co-plaintiff John Geremia is

alleged to have committed criminal misconduct. So at the very start Judge Hunt should have disqualified himself. INSTEAD he chose to call Plaintiffs Motion to Recuse him pursuant to 28 USC 144 a Motion to Disqualify. pursuant to 28 USC 455. Respectfully this Judge had the audacity to call the Motion one to Disqualify and he refused to step down!

This was no less than a violence on Plaintiffs as 28 USC 455 is self-executing.

"Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no particular procedure that a party must follow to obtain judicial disqualification under 455(a). Instead, the section sets forth a mandatory guideline that federal judges must observe *sua sponte.*" For the Sixth Circuit

Court of Appeals in **Roberts v. Bailar** 625 F. 2d 125, 128 (1980).

Furthermore in regards to 'Judicial Misconduct'.

The presiding federal judge (currently a 9th Circuit Judge), Judge Rawlinson stated an untruth when in her order denying Plaintiffs' Motion to Amend she asserted that Plaintiff Geremia failed to attach their Amended complaint to their Motion to Amend. The record clearly reflects this.

The plaintiff pointed this 'intentional error' in their Motion for Reconsideration. So ultimately Judge Rawlinson denied plaintiffs Motion to Amend once again . This was based on Defendants opposition. Highly unusual if not improper practice, given the fact that in Judge Rawlinson's own order filed on June 28, 2000 she states;

> Rule15(a) of the Federal Rules of Civil procedure provides that leave to amend pleadings shall be liberally granted when the interests of justice so require.

Once again this is an untruth or at the very least a misquote. As Rule 15(a) states in pertinent part;

> ...leave shall be freely given when justice so requires...

THIS IN ITSELF PRECLUDES THE FILING OF ANY OPPOSITION.

In regards Motion for Partial Summary Judgment on Lynn Geremia's Rico and Conspiracy Claims

Clearly the argument which surrounds RICO and CONSPIRACY CLAIMS involving 26 USC 31.6053 was well founded by the plaintiff. Its a rather simple matter as this Court only needs to compare the affidavit of Don Thrasher (comptroller for Colorado Belle Defendant) with 26 USC 31.6053-3(f) *first sentence* and 26 USC 31-6053-3(f)(iv) *last sentence* to conclude that Colorado Belle's audit method was in
violation of US Tax Regulation as it had entered into *Good Faith Agreements* and obviously has more than the '*less than 25 employees'* provision.

Obviously this matter is so simple that Plaintiff must contend to this Court this was 'intentional Judicial Error'. Employees were threatened with audit by co-conspirator Internal Revenue Service by use of a local news article in the Las Vegas Review Journal. Employees were misinformed about what the U.S. Tax regulation 31.6053 actually said by Colorado Belle Hotel management.

In regards to Motion for Partial Summary Judgment on Lynn Geremia's Title VII and Equal Pay Act Claims

The primary exhibit in this argument was the use of Employee Evaluations as a pretense to pay Lynn Geremia a female less than males in her same job category. Clearly case law submitted by the Plaintiff proves this *Job Evaluation* was subjective and relied to heavily to a supervisors opinions. This *Job Evaluation* and its effect on pay raises was not used but for one year, contrary to the Court order. Also because this *Job Evaluation* was only used to gauge the amount on pay raises one year and the Courts order implies that it continues to be used, which it does not, the plaintiff must contend that this is once again 'Intentional Judicial Error'. Clearly Lynn Geremia had many more years seniority and experience than her male co-workers, yet was paid less. Lynn Geremia was not aware of any "merit system" based on a "job evaluation". Colorado Belle has not shown that she was aware of any "merit system" in any of their exhibits or pleadings.

Furthermore; Subjective evaluations of employer cannot stand alone as the basis for salary discrimination based on sex. **Brennan v. Victoria Bank &Trust Co.** C.A. Tex.1974, 493 F.2d 896. In this case at bar the Colorado Belle merely calls a subjective job evaluation (Performance Appraisal) that has been used since 1987 the foundation of a "Merit System" for one year in 1994. The performance appraisal measured areas including: quality of work, dependability, ability to get along with fellow workers, attitude, initiative,

judgment,guest relations ,dress and grooming, and punctuality/attendance. All of these areas were answered with the OPINION of management, which is highly subjective. The only area that could be based on facts was punctuality/attendance, in which Lynn Geremia excels at, never late and absent on the average of once a year.

"The system will not be bona fide if it is based on an evaluator's "gut feeling."**Grove v. Frostburg Nat. Bank** 549 F Supp 843 or other subjective, ill-informed, informal, and unsystematic judgments of an individual's worth or value. **Brock v Georgia Southwestern College** 765 F 2d 1026. A standardized form by which supervisors were required to evaluate the actual performance of employees over several months was held invalid for subjectivity in **Brito v. Zia Co.** 478 F 2d 1200.

Judge Dawson in his order filed Oct. 30, 2001 at ***see*** **App. 22** would have this court believe that the legitimacy of the performance appraisals and there use as a merit system is somehow made legitimate because the appraisals have been continually used since 1980 to the present time (22 years). Judge Dawson fails to grasp that the appraisals were only used for "pay increases" one year out of 22 years!...**The performance appraisal** used to determine the increases in 1994 based on the "Pay for Performance" program.

Judge Dawson's order ***see*** **App. 23**, the Honorable Judge devotes a paragraph that there is only mention of gender discrimination based on wage disparity, and the investigation was central to that in Geremia's Complaint. Once again Judge Dawson fails to grasp that numerous incidents happened shortly after filing

the case at bar. Judge Dawson fails to grasp the prior acts, and chain of conduct! Geremia's had already received one jury award and one out of court settlement in two prior cases! Judge Dawson eludes to the three warning slips as received 'where somehow trivial ' and fails to mention the threat of termination. This is outrageous as Plaintiff tried to amend the lawsuit days after the incidents. Judge Dawson also speaks as though the warning slips were somehow justifiable, yet offers no proof of that. Judge Dawson in fact offers erroneous opinion on facts reserved for the "trier of facts" throughout his order and especially at page 6 C.

During the course of this case at bar Lynn Geremia received 3 warning slips which threatened termination! After several years without receiving any warning.

Furthermore; Employers should be aware of the prohibitions set forth in Section 1985(2) of the Civil rights Act. The Act prohibits the conspiracy of deterring force, intimidation or threat to any witness who may testify in any federal proceeding. the Act prohibits injuring a person or person's property in retaliation for testifying. As a preventive measure, employers should assure all employees that no adverse employment action will be taken against any employee who participates or aids in any internal or governmental investigation or lawsuit. **Haddle v Garrison,** No. 97-1472, 1198 W.L. 856125 (S. Ct. Dec. 14 1998). Clearly this is not trivial employment actions. "Only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation." **Brook v. City of San Mateo,** 229 F. 3d

928. Clearly this is strong evidence that Lynn Geremia had (1) involvement in a protected activity, (2) an adverse employment action and (3) a casual link between the two. **Payne v. Norwest Corp.,** 113 F.3d 1079,1080(9th cir. 1997). Once established, the burden shifts to the employer to present legitimate non-discriminatory reasons for the adverse employment action. **Brooks** 229 F.3d 917,927 (9th Cir. 2000). Lynn Geremia received four slips and the threat of termination DURING the course of this case at bar. It has not been proven these warnings and threats were justifiable yet Lynn Geremia had not received any for several years prior. "Not every employment decision amounts to an adverse employment action." **Strother v. Univ. of So. Calif. Permanente Med. Group,** 79 F.3d 859,869 (9th Cir. 1996). "An action is cognizable as an adverse employment action if its reasonably likely to deter employees from engaging in protected activity." Clearly whether the warnings and threat of termination, as well as assigning Bill Littlefield whom Lynn Geremia had sued for Assault and Battery in the past was adverse treatment is reserved for the 'trier of facts'.

In Regards to Motion for Partial Summary Judgment on Lynn Geremia's claims for intentional infliction of emotional distress & punitive damages & John Geremia's claim for Loss of Consortium

Clearly it is well grounded in case law that whether or not the acts of Defendant were intentional is a fact for the jury to decide. The trier of facts.

It also shows a lack of fair and just administration that the court is quick to point out Nevada Revised Statutes in regards to punitive damages. Yet the court fails to point out the obvious right to punitive damages in a Title VII and retaliation claim. Clearly prima facie has been established. Showing this John Geremia's consortium claim must stand.

An employer can be liable for punitive damages under Title VII whenever it engages in discriminatory conduct "with malice or reckless indifference to the federally protected rights" of employees. 42 USC 1981(a)(b)(1)

In **Kolstad v. American Dental Association** (decided June 22, 1999)

The Supreme Court held:

An employers conduct need not be independently "egregious" to satisfy 1981a's requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the "malice" or "reckless indifference" needed to qualify for such an award. The 1991 Act provided for compensatory and punitive damages in addition to the backpay and other equitable relief to which a prevailing Title VII plaintiffs had previously been limited. Section 1981a's two-tiered availability of punitive awards to instances of "malice" or "reckless indifference"- suggest a congressional intent to impose two standards of liability, one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award. the terms "malice" and "reckless indifference" ultimately focus on the actor's state of mind, however, and 1981a does not require a

showing of egregious or outrageous discrimination independent of the employer's state of mind. Nor does the statute's structure imply an independent role for "egregiousness" in the face of congressional silence. On the contrary, the view that 1981a provides for punitive awards based solely on an employer's state of mind is consistent with the 1991 Act's distinction between equitable and compensatory relief. Intent determines which remedies are open to a plaintiff here as well. this focus on the employer's state of mind does give effect to the statute's two-tiered structure.

The terms "malice" and "reckless indifference" pertain not to the employer's awareness that it is engaging in discrimination, but to its knowledge that it may be acting in violation of federal law *emphasis added* Smith v. Wade 461 U.S. 30,37,n.6,41,50. There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard, as where the employer is unaware of the relevant federal prohibition or discriminates with the distinct belief that its discrimination is lawful, where underlying theory of discrimination is novel or otherwise poorly recognized, or where the employer reasonably believes that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability. Hazen Paper Co. v. Biggins, 507 U.S. 604, 616, 617. Although there is some support for respondent's assertion that the common law punitive awards tradition includes an "egregious misconduct" requirement, eligibility for such awards most often is characterized in evil motive, but 1981a does not limit plaintiffs to this form of evidence or

require a showing of egregious or outrageous discrimination independent of the employer's state of mind. *emphasis added.*

In regards to Motions for Dismissing the Internal Revenue Service as a defendant.

The order granting this motion was premature as the Internal Revenue never answered the complaint. The Conspiracy Claims obviously relied on discovery in regards to Internal Revenue Service.

This is made most obvious by 26 USC 7403 which allows for the filing of civil actions both by the individual and the Internal Revenue Service. Rightfully the Plaintiff named the Internal Revenue Service.

Furthermore, all of the case law cited must be distinguished from this case on appeal as none of those cases pertain to the Internal Revenue Service. US Attorney Kathryn Landreth merely asserts that the Internal Revenue Service is the United States but offers no case law that would confirm that with specific cases wherein the Internal Revenue Service is a party. At best this is specious argument and at worst a fraud on the court. Dismissing the Internal Revenue Service because a Pro Se litigant failed to call the Service 'The United States' is an injustice of the highest degree. This argument would never been presented against a party with counsel. Merely the court and defendant attorney would have just entered into a stipulation naming the Internal Revenue Service as the United States. As the court and defendant has agreed that the Internal Revenue Service is the United States then it should have been so ordered. Justice was not served by dismissing the Internal Revenue Service as a defendant.

A complaint may not be dismissed on motion if it states some sort of claim, baseless though it may eventually prove to be, and inartistically as the complaint may be drawn. Particularly is this true where a defendant is not represented by counsel, and in view of rule 8(f) of the rules of civil procedure, 28 U.S.C., which requires that all pleadings shall be construed as to do substantial justice. Accordingly, the complaint will not be dismissed for insufficiency." emphasis added *in* **Bart v. City of New York,** 2Cir., 1946, 154 F. 2d 791 Clearly this court must agree that the Internal Revenue Service has committed a fraud on the court. A motion for sanctions in regards to committing a fraud on the court should not be needed, this court has a duty to sanction this defendant. The defendant counsel as well as the court attempted to confuse the Pro Se litigant into believing that the Internal Revenue Service was the United States and therefor could not be sued. Yet it is well known that the Internal Revenue Service is a party in more than 650 complaints filed in U.S. Federal Court every year. Does the United States Court of Appeals For The Ninth Circuit believe that justice is best served by dismissing the Internal Revenue as a Defendant because a Pro Se litigant failed to parenthesize (United States of America) in the Defendant's title on the cover of the complaint? The order dismissing Internal Revenue Service was based on argument that was unfair through selecting only certain favorable aspects (special pleading). The court's order was based on false premise.

Furthermore, Section 7433(a) was amended by the Internal Revenue Service Restructuring and

Reform Act of 1998, Pub. L. No. 105-206, 3102(a)(1)(A), 112 Stat. 730. As amended, Section 7433(a) allows a wrongful collection action against United States if IRS employees disregard any provisions of the internal revenue laws recklessly or intentionally, or by reason of negligence. This is exactly what Plaintiff Geremia asserts in their Complaint. **The conspiracy and violations of Tax Regulations continues to this day and will not stop until this matter is properly litigated. Therefor there is no Statute of Limitation in regards to 7433(a).** Also recently Lynn Geremia has become aware of a 'Tip Rate Determination Program' currently being used, yet Colorado Belle never got the required 75% of employees to sign up for this program.

She only just became aware of this in February of 2002 when IRS sent a letter of intent to audit Lynn Geremia. This happened the same day as Lynn's Scheduling Order was file stamped 2/8/02. Lynn Geremia believe this is threatening bevavior for filing a Notice of Appeal to the 9th Circuit. Lynn Geremia is a Federal Court litigant and witness and will request protection pursuant to 42 USC 1981(a)(b)(1).

As even Judge Rawlinson in her order Filed 6/5/00 states:

> Plaintiffs contend that the IRS conspired with Colorado Belle "to force an illegal tax policy" on Colorado Belle's employees. Plaintiffs contend that the *actions of Colorado Belle and IRS constitute racketeering activity.*

Furthermore, a *real party* is a person who actually stands to gain or lose something from being part of the case and a *formal* or *nominal party* is one who has only a technical or "name only" interest. Circumstances show that substantial injustice and unfair administration of the complaint accured based on a mere formality.

Cases have been brought all the way to the United States Supreme Court naming the defendant as the IRS without the need to specify the IRS as the "United States". exemplified by **Beresford v. IRS** Supreme Court case No. 01-291.

Once again the circumstance point to a failure of the court to maintain a just and fair administration of the complaint.

Furthermore more blatant bias behavior by the court is shown when this Court purviews Defendant Colorado Belle's Motion to Compel The plaintiff was taken advantage of by the court and defendant. Plaintiff answered interrogatories to the best of there abilities and they were sanctioned $400. dollars.

Simply stated;

Defendant counsel and the court attempted to take advantage of a Pro Se litigant because initially the correct terminology was not used. In pertinent part;

> ....plaintiff is without knowledge or information sufficient to form an answer, any further than the answer...

This is a prime example of what went on by and between the court and defendant Colorado Belle throughout this case. This court must resolve this dispute and sanction as the District Court never did.

To have ruled would have meant giving credibility to the plaintiff Geremia and exposing bias behavior by the court.

IN REGARDS TO DEFENDANT'S AWARD OF $84,028.90 IN ATTORNEY'S FEES.

Simply stated, respectfully this is ludicrous, the record shows no hint of frivolous behavior by the plaintiff. In fact the only mention of sanctionable behavior by the plaintiff is at page 2 line 22 and 23 of the court's order granting attorney fees. See Exhibit 7. This is unjustified. Moreover, the district court should provide a "concise but clear explanation of its reasons for the fee award". **Hensley**, 461 U.S. at 437; **See also Phelps v. Hamilton** 120 F. 3d 1126, 1129 (10th Cir. 1997) (quoting **Hensley**). A motion for sanctions in regards to plaintiff refusing to verify deposition transcripts was never filed. The court never asked about the circumstances rather it made bias assumptions. The plaintiff attempted to send in verification via certified mail and delivery was unclaimed. This at worst was a minor problem.

Contrary to Colorado Belle's assertion in their answering brief to the 9th Circuit, no State Court has ever determined the manner in which Colorado Belle allocates tips to be legal. The court did not render any opinions. Nor does this prevent an action in Federal Court at a later date.

In Colorado Belle's Motion for Attorney's Fees they rely on **Whiten v. Ryder Truck Lines, Inc.** 520 F. Supp. 1174, 1176-77 (M.D. La. 1981 (where employee challenged seniority system previously approved by the Supreme Court). This case at bar must be distinguished from **Whiten** as no court approved the "Merit System" based on subjective job

appraisals used as a pretext to violate the Equal Pay Act.

An offer was made by Colorado Belle in the aggregate amount of $10,000. The Plaintiffs felt this was unreasonable. Before this court is a case full of chicanery, deceit and attempts by both the defendant and the court to mislead a pro se litigant. Yet the lower court's only interest is unfounded accusations of frivolous behavior by the plaintiff.

Before this court can affirm frivolous behavior and the unwarranted and unprecedented fees of $84,028.90 justice requires that this frivolous behavior is shown with specificity. Under the 'American Rule' parties are ordinarily required to bear their own attorney's fees. And courts follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority. **Key Tronic Corp. v. United States** 511 U.S. 809, 819. Furthermore, an exception allows federal courts to exercise their inherent power to assess such fees as a sanction when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, as when the party practices a fraud upon the court. **Universal Oil Products Co. v. Root Refining Co.** 328 U.S. 575, 580. The record shows no hint of this behavior by the plaintiff but does show this type of behavior by the defendant. The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. **Muscella v. sun Shipbuilding & Dry Dock Co.** 12 brbs 272 (1980).

Instead of Judge Dawson assertion that he was denying Plaintiffs' Motion for a Stay in regards to

attorney fees, because plaintiff was frivolous, properly Judge Dawson should have denied the Motion to Stay as moot. A stay of the attorney's Fee award pending appeal is unnecessary as an attorney's fee award is not a compensation order and does not become effective until all appeals are exhausted. **Thompson v. Potashnick Constr. Co.** 812 F. 2d 574 (9th Cir. 1987).

The award of Attorney fees was not reviewed because the panel believes Plaintiff/Appelant failed to file a Notice of Appeal or Amended Notice.

It is quite disconcerting that even after Plaintiff Geremia submitted Supreme Court case law that concluded that Geremia's Appeal of Attorney Fees Award should be considered as a Notice, the 9th Circuit panel in it order regarding Plaintiff's Request for an En Banc hearing stated; ***(see* App.3)**

> We reject the Geremias' contention that raising the Attorney's fee issue in their reply brief constituted a notice of appeal.

This pleading was titled;

***Reply* to Colorado Belle's Answer and Appeal of Order awarding $84,028.90 in attorney's fees to the Defendant.**

Clearly this Supreme Court must review the Attorney Fees Award in the light of holdings by **Smith v. Barry ,** No. 90-7477, argued Dec. 2, 1991, Decided Jan. 14, 1992.

502 U.S. 244

Rule 3 of the Federal Rules of Appellate Procedure conditions federal appellate jurisdiction on the filing of a timely notice of appeal. In response to

petitioner Smith's filing a premature, and therefore invalid, notice of appeal in his action for damages against state officials under 42 U.S.C. 1983, the Fourth Circuit's Clerk sent the parties copies of the "informal brief" that that court uses in pro se appeals and an explanatory order. Smith returned his informal brief within the deadline for filing a notice of appeal, but the Court of Appeals dismissed the Appeal for want of jurisdiction, concluding, inter alia, that a brief can never be considered a notice of appeal.

Held: A document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3. So long as such document is filed within the time allowed by Rule 4 for a notice of appeal and satisfies Rule 3(c)'s requirements as to the content of such a notice, it may be treated as the "functional equivalent" of the formal notice of appeal, 487 U.S. 312, 317. The fact that Smith filed his informal brief in response to a briefing order is irrelevant, since it is the notice afforded by a document, not the litigant's motivation in filing it, that determines the document's sufficiency as a notice of appeal. Moreover, the fact that the Rules envision that the notice of appeal and the appellant's brief will be two separate filings does not preclude an appellate court from treating the brief as a notice of appeal in the appropriate circumstances. Rule 3(c) requires that an appeal not be dismissed for informality of form or title of the notice of appeal, and proper briefing is not a jurisdictional requirement under the Rules. The fact that Smith filed his brief with the court of appeals, rather than the District Court, as required by Rule 3(a), is also irrelevant,

since Rule 4(a)(1) sets out procedures to be followed when the notice of appeal is mistakenly filed with an appellate court. On remand, the court of Appeals should determine whether Smith's brief contains the information required for a notice of appeal by Rule 3(c). Pp. 247-250.

Justice Black stated in **Conley v. Gibson,** 355 U.S. 41 at 48 (1957) "The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." According to rule 8(f) FRCP all pleadings shall be construed to do substantial justice."

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUITS DECISION VALIDATES THE USE OF A HIGHLY SUBJECTIVE MERIT SYSTEM.

The Ninth Circuit's opinion conflicts with numerous other Appellate Court's decisions *Brennan v. Victoria Bank & Trust Co.* C.A. Tex. 1974, 493 F.2d 896, *Grove v. Frostburg Nat. Bank* 549 F.Supp 843, *Brock v. Georgia Southwestern College* 765 F. 2d 1026, *Brito v. Zia Co.* 478 F.2d 1200.

2. THE NINTH CIRCUIT DECISION VALIDATES RETAILATION BY AN EMPLOYER WHEN AN EMPLOYEE INVOLVES THEMSELVES IN PROTECTED ACTIVITIES.

The Ninth Circuit's opinion conflicts with an Appellate Court including their own *Brook v. City of San Mateo,* 229 F.3d 928, *Payne v. Norwest Corp.,* 113 F. 3d 1079,1080 (9TH CIR. 1997) and conflicts with the Supreme Court decision in *Haddle v. Garrison,* No. 97-1472, 1198 W.L. 856125 (S.Ct. Dec. 14, 1998).

3. THE NINTH CIRCUIT DECISION DISREGARDS 26 U.S.C. 7433(a) AS AMENDED BY THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998.

The petitioner failed to cite to this law until they filed their appeal to the Ninth Circuit due to their lack of experience and knowledge as pro se litigants. None the less this is still a law that has to be enforced.

4. THE NINTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT DECISIONS REGARDING A 'TRAP' FOR PRO SE LITIGANTS IN REGARDS TO AN AWARD OF ATTORNEY FEES BY DISTRICT COURT AFTER THE FILING OF AN APPEAL.

The Petitioner Geremia filed a well grounded request for rehearing En Banc. Geremia's Reply brief should have been considered as a Notice of Appeal as it met all the requirements of Rule 3 of the Federal Rules of Appellate Procedure, pursuant to *Smith v. Barry,* 502 U.S. 244, No. 90-7477, argued Dec. 2, 1991, Decided Jan. 14, 1992.

5. THE NINTH CIRCUIT FAILED TO ADDRESS THE JUDICIAL MISCONDUCT AND UNFAIR AND BIAS ADMINISTRATION OF THE COMPLAINT.

Properly the complaint must be administered in a fair and just manner.

CONCLUSION

THEREFORE, Petitioners LYNN GEREMIA and JOHN GEREMIA requests that this Court **GRANT** this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Lynn Geremia J. Geremia

LYNN GEREMIA and
JOHN GEREMIA
Petitioners in Proper Person
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Laughlin, Nev. 89029
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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVID GEREMIA; et al.,	No. 02-15229
Plaintiffs-Appellants,	D.C. No. CV-99-01703-KJD
V.	
COLORADO BELLE CORP.; et al.,	MEMORANDUM*
Defendants-Appellees.	FILED JAN 16 2003

Appeal from United States District Court
For the district of Nevada
Kent J. Dawson, District Judge, Presiding

Submitted January 13, 2003**

Before: BEEZER, KLEINFELD, and PAEZ, Circuit Judges

Lynn and John Geremia, husband and wife, appeal pro se the district court's summary judgment in favor of Lynn's employer, Colorado Belle corp., the dismissal of the Geremias' claims against the Internal Revenue Service("IRS"), and various non-disparities orders. We have jurisdiction pursuant to 28 U.S.C. 1291, we review de novo, *Barnett v. Centoni,* 31 F.3d 813, 815, 816 (9th Cir. 1994)(per curiam), and we affirm.

The district court properly construed the Geremias claims against the IRS as against the United States and determined that they were barred by sovereign immunity.

See Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985).

Because the Geremias did not proffer sufficient evidence to show a genuine issue of material fact as to any of their claims, the district court properly granted all of Colorado Belle's motions for partial summary judgment. *See Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001)(en banc).

The district court did not abuse its discretion by denying the Geremias' motion to amend the complaint. *See Albrecht v. Lund*, 845 F.2d 193, 195(9th Cir.)(leave to amend may be denied where amendment would be futile), *amended by*, 856 F.2d 111 (9th Cir.1988).

Because the Geremias did not amend their notice of appeal or file a second notice of appeal following the district court's award of attorney's fees, we lack jurisdiction to review the award. *See Culinary & Serv. Employees Union, AFL-CIO Local 555 v. Hawaii Employee Benefit Admin.., Inc.*, 688 F.2d 1228, 1232 (9th Cir. 1982).

The district court properly denied the Geremias' motion seeking the recusal of the district judge. *See Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 712-13 (9th Cir. 1993)(per curiam).

The district court did not abuse its discretion by requiring Lynn Geremia to appear for an independent medical examination regarding her intentional infliction of emotional distress claim, or by requiring the Geremias to pay Colorado Belle's reasonable expenses following its successful motion to compel discovery responses. *See* Fed. R. Civ. P.35(a) & 37(a)(4)(A).

We are unpersuaded by the Geremias' remaining contentions.

We have not considered factual exhibits or legal arguments proffered for the first time on appeal. *See Smith*

v. Marsh, 194 F.3d 1045, 1952 (9th Cir. 1999); *Partridge v. Reich,* 141 F.3d 920, 926 n.4(9th Cir. 1998).

AFFIRMED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVID GEREMIA;et al.,	) No. 02-15229
	)
Plaintiffs-Appellants,	) D.C.No. CV-99-
	)
V.	) ORDER
	)
COLORADO BELLE CORP.;et al.,	)
	)
Defendants-Appellees.	)
	)

ORDER Filed Apr. 30, 2003

Before: BEEZER, KLEINFELD, AND PAEZ, Circuit Judges

Judges Kleinfeld and Paez vote to deny the petition for rehearing en banc, and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc. *See* Fed.R.App. P.35.

The petition for rehearing en banc is denied. We reject the Geremias' conention that raising the attorney's fee issue in their reply brief constituted a notice of appeal.

No further filings shall be accepted in this closed appeal.

APP.4

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORDER **D.C. No. CV-99-01703-KJD**

Entered and Served June 5, 2000

This matter is before the Court on the Motion to dismiss (#13) filed on behalf of the Internal Revenus Service ("IRS"). Plaintiff filed apposition (#22).

Background

Plaintiffs Lynn and John Geremia brought this action against Lynn Geremia's former employer Colorado Belle Corp. ("Colorado Belle"), NERC, and the Internal Revenue Service ("IRS"). The gist of Plaintiffs' complaint is that the Colorado Belle discriminated against Lynn Geremia based on gender, and NERC failed to adequately investigate the complaint. NERC, a state agency, has moved to dismiss all claims against it.

Plaintiffs contend that the IRS conspired with Colorado Belle "to force an illegal tax policy" on Colorado Belle's employees. Plaintiffs contend that the actions of Colorado Belle and IRS constitute racketeering activity.

Discussion

A defendant may file a motion to dismiss a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). All well-pleaded allegations of material fact made by the non-movant are taken as true and construed in a light most favorable to the non-movant. *Wyler Summit Partnership v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The court should not dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts to support the claim that would entitle the plaintiff to relief. *Tyler v, Cisneros*, 136 F.3d 603,607 (9th Cir. 1998)/

The United States has consented to be sued for refund of taxes. *See* 28 U.S.C. 1346(a); *see also* Hull v. United States, 146 F.3d 235, 238 (4th Cir. 1998). However, the IRS cannot be named as a defendant. Rather, the United States is the proper Defendant. *See White v. IRS,* 790 F. Supp. 1017, 1019-20 (D. Nev. 1990).

The government's sovereign immunity remains intact absent a specific waiver of authority. *See Clintion v. Babbitt,* 180 F.3d 1081, 1087 (9th cir. 1999). Plaintiff has not cited to, and the Court is not aware of, any case or statute reflecting waiver of the United States' sovereign immunity from actions under the Racketeer Influenced and Corrupt Organizations ("RICO") statute. For the above stated reasons,

IT IS **ORDERED** that Internal Revenue Service's Motion to Dismiss (#13) is GRANTED.

The Clerk shall enter judgment accordingly.

DATED this 2nd day of June 2000.

Johnnie B. Rawlinson

United States District Judge

App. 6

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA **D.C. No. CV-99-01703-KJD**
ORDER ENTERED AND SERVED OCT. 10.2001

I. INTRODUCTION

This matter is before the Court on Defendants' Partial Motion for Summary Judgment (#97), Plaintiffs' Opposition (#107) and Defendants' Reply (#110).

II. FACTUAL BACKGROUND

Plaintiff Lynn Geremia has been a bartender at the Colorado Belle in Laughlin, Nevada since June 19, 1987, Plaintiff has been with the parent corporation since 1980. In November of 1992, Lynn geremia completed an Employee Voluntary Statement which notified Colorado Belle of the problems she was having with bill Littlefield, a bar-back with whom she works. On December 9, 1992 Mr. Cecil Pettis, the then Assistant Food & Beverage Directors, sent a memo to both Lynn Geremia and bill Littlefield telling them they both acted with some "animosity" and directed them to be professional and courteous with each other.

Mr. Littlefield had been scheduled to work the same bar with Lynn Geremia on Bebruary 17 through February 20, 1999. However, Mrs. Geremia complained to the management that she did not want to be scheduled with Mr. Littlefield. Mrs. Geremia had filed a Complaint against Littlefield in state court alleging, among other things, assault and battery in 1993. Littlefield then sent several letters to management expressing his discontent with not being assigned to Mrs. Geremia's shooter bar. Management subsequently scheduled the two at the same bar, and they worked together without incident.

In 1994, Colorado Belle instituted a "Pay for Performance" program which resulted in two male

bartenders with less seniority than Mrs. Geremia receiving a higher wage. In 1999, Mrs. Geremia complained to her supervisors about other employees making more money than she did. This occurred months prior to sending a letter to the Nevada Equal Rights Commission ("NERC"). Mrs. Geremia filed an official charge of discrimination with NERC on April 22, 1999 based on the wage differences..

Colorado Belle has filed this motion for partial summary judgment stating that is is entitled to judgment as a matter of law as to the Geremias' intentional infliction of emotional distress (IIED) claim, the claim for punitive damages, and Mr. Geremia's loss of consortium claim. These claims are based on what Mrs. Geremia conveys as a pattern of derogatory remarks and discriminatory employment practices. Specifically, Mrs. Geremia alleges that her requests to have a bar-back have been ignored, while the male bartenders requests are met. She claims that she has been repeatedly yelled at and insulted. In support of her claim for punitive damages, Mrs. Geremia attributes the following actions to Colorado Belle; failing to increase her wage; promoting a hostile atmosphere; making derogatory remarks; treating her with indifference; failing to properly staff her bar; failing to promote her; making threats; intimidating her; and subjecting her to retaliation.

Mrs. Geremia claims that Colorado Belle's actions have caused her to suffer loss of self-esteem, sleep, love and affection from her spouse, humiliation and anxiety. Her family has also suffered because she is so upset upon returning from work she is unable to perform her duties as mother and wife. These effects prompted Mr. Geremia's consortium claim.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment is a procedure which terminates, without trial, actions in which "there is

no genuine issue as to any material fact and the the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any," **Id.**

A movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)(quoting Fed.R.Civ.P. 56(e). In order to preclude a grant of summary judgment, the nonmoving party must do more than show that there is some "metaphysical doubt" as to the material facts. See Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). The court will view all underlying facts in the light most favorable to the non-moving party. See Martinez v. City of Los Angeles, 141 F.3d 1373, 1378, (9th Cir. 1998)(citing Matsushita Elec. Indus. Co. 475 U.S. at 587).

Although the non-moving party has the burden of persuasion, the party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. See Metro Indus.,Inc. v. Sammi Corp., 82 F.3d 839,847(9th cir. 1996). That burden is met by showing an absence of evidence to support the non-moving party's case. See Celotex Corp., 477 U.S. at 325. The burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. See Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). In meeting this burden, parties seeking to defeat summary judgment cannot rest upon allegations of denials of pleadings, but must demonstrate a genuine issue for trial. See Brinson v. Linda Rose Joint Venture, 53 F. 3d

1044, 1049(9th Cir. 1995). Under 56(e), the adverse party must allege specific facts supported by affidavit that raise triable issues. See id. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. See Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996).

IV. LEGAL ANALYSIS

To sustain a claim for the intentional infliction of emotional distress, Nevada law requires the plaintiff to show: "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plantiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." Star v. Rabello, 97 Nev. 124, 125 (1981). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. RESTATEMENT (SECOND) OF TORTS 41 (1965). "[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988), cert. Denied, 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 23 (1990).

Mrs. Geremia complains of conduct that consists of ignoring her requests for bar-back support, unequal pay, and "unreasonable harassing comments and insults by her manager." She also claims the Colorado Belle's issuance of warnings for having a food item in a prohibited location where it is customary for some employees constitutes extreme and outrageous conduct. In support of her claim for

IIED, Mrs Geremia makes several citations to Georgia law. However, a review of Georgia IIED jurisprudence reveals that the elements required to make out claim are less demanding than in Nevada.

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1 A Georgia plaintiff must show 1) that defendant's behavior was willful and wanton or intentionally directed to harming plaintiff; 3) that conduct caused mental suffering or

The court finds that the actions complained of do not rise to the level of outrageousness required in the state of Nevada. The expansion of Negligent and Intentional Infliction of Emotional Distress law in Nevada has been slowed in order to prevent a flood of litigation. Often this may produce harsh results. See Grotts v. Zahner, 115 Nev. 339 (1999)(proof of "serious emotional distress" required where there has been no physical impact). Accordingly, Colorado Belle is entitled to summary judgment on Geremia's IIED claim.

A. The Facts Do Not Indicate that Colorado Belle's Actions Justify an Award of Punitive Damages.

Nev. Rev. Stat. 42.005(1) permits an award of punitive damages "for the breach of an obligation not arising from contract, where it is proven by clearand convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant ." Oppression has been defined as the "conscious disregard for the rights of others which constitutes an act of subjecting plaintiffs to cruel and unjust hardship." Ainsworth v. Combined Ins. Co. of America, 104 Nev. 587 (1998). Malice requires actual hatred or ill-will, or the acting with the purpose to injure, vex, annoy or

harass. Craigo v. Circus-Circus Enterprises, Inc., 106 Nev. 1 (1990).

Moreover, Nev. Rev. Stat. 42.007 states that an employer is not liable for punitive damages unless: (a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others; (b) The employer expressly authorized or ratified the wrongful act of the

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wounded feelings or emotional upsets or distress to plaintiff. Coleman v. Housing Authority of Americus, 191 Ga.App. 166, *170, 381 S.E.2d 303, **306(1989).

Employee for which the damages are awarded; or (c) The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the corporation is not liable unless the above elements are met by "an officer, director or managing agent who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation." Nev. Rev. Stat. 42.007.

The Court has already found that Colorado Belle's actions did not rise to a level of outrageousness sufficient to make out claim for IIED, the Court now finds that its actions do not warrant an award of punitive damages. The conduct alleged does not demonstrate oppression, fraud, or malice. Moreover, the Geremias did not even attempt ot show the existence of a material issue of fact in its opposition to the motion for summary judgment. Parties seeking to defeat summary judgment cannot rest upon allegations of denials of pleadings, but must demonstrate a genuine issue for trial. See Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). The Geremias

must allege specific facts supported by affidavit that raise triable issues of fact. See id. From the little evidence submitted, even viewing it in the light most favorable to the Geremias, no genuine issue of fact has been presented. The Court realizes that Plaintiffs are suing in proper person, so it has examined the pleadings to determine whether a material issue of fact exists. One does not. Therefore, Colorado Belle is entitled to summary judgment on the Geremias' claim for punitive damages.

B. John Geremia's Loss of Consortium Claim.

John Geremia has essentially failed to oppose Colorado Belle's motion for summary judgment as to the loss of consortium claim. His bare statement "Due to the fact this Court as a matter of law cannot act on her IIED claim as the jury must decide this claim, John Geremia's consortium claim must be decided by the jury" does not constitute an opposition. Nor does it demonstrate a genuine issue of material fact necessitating a trial. The Court will

Nevertheless address this claim. Defendant's accurately cites the current state of the las on this cause of action. "The claim for loss of consortium is a wholly derivative cause of action contingent upon a third party's tortuous injury to a spouse." Runcorn v. shearer Lumber Products, Inc., 107 Idaho 389,394,690 P.2d 324,329 (1984). Because the Court has found as a matter of law that the Geremias' IIED claim cannot stand, the loss of consortium claim must fail also.

V. CONCLUSION

IT IS HEREBY ORDERED that Colorado Belle's Motion for Summary Judgment (#97) is GRANTED.

DATED this 10th day of October, 2001.

Kent J. Dawson

United States District Judge

App. 13

UNITED STATES DISTRICT COURT
District OF NEVADA **D.C. No. CV-99-01703-KJD**
ORDER ENTERED AND SERVED OCT. 15, 2001

I. INTRODUCTION

This matter is before the Court on Defendants' Partial Motion for Summary Judgment (#98), Plaintiffs' Opposition (#108) and Defendants' Reply (#111).

II. FACTUAL BACKGROUND

Plaintiff Lynn Geremia has been a bartender at the Colorado Belle in Laughlin, Nevada since June 19, 1997. Colorado Belle calculates and allocates the tips of its bartenders pursuant to a tip allocation good faith agreement that was approved by two-thirds of its bartenders as required by 26 C.F.R. 31.6053-3(e). Geremia filed a lawsuit in state court against Colorado Belle alleging negligent tip allocation which was dismissed after a finding of compliance with 26 C.F.R. 31.6053-3(e). Colorado Belle continues to use this tip allocation method. The good faith allocation agreement is binding on Geremia, since it was approved by a two-thirds majority of employees in her tipped employee classification.

Geremia sent a certified letter to the Nevada Equal Rights Commission ("NERC") on November 30, 1998 alleging that Colorado Belle was discriminating against her based on a wage disparity between her and male bartenders with less seniority. In April of 1999, Geremia filed an official charge of discrimination with NERC. In response to NERC's request for information related to Geremia's charge, Colorado Belle's Human Resources Director sent NERC a history of the wages and pay increases of Colorado Belle's male and female bartenders.

On July 15, 1999, Geremia, Colorado Belle's Human Resources Director Debbie Wootan, and NERC Compliance Investigator Peggy Hall held a telephone conference regarding Geremia's charge. Hall asked Wootan questions regarding the difference in pay between Geremia and male bartenders. On October 4, 1999, Peggy Hall sent Geremia a predetermination letter advising Geremia that, after a thorough review of all the information presented, a recommendation of no probable cause was going to be sent to the Administrator unless Geremia had additional evidence to submit. Geremia sent a rebuttal letter that only reiterated that male bartenders earning more with less seniority was evidence of discrimination. Geremia has admitted that she does not understand Colorado Belle's "pay for performance" program which was in place in 1994.

On November 10, 1999, William Stewart, a NERC administrator, sent Geremia a letter informing Geremia that two letters she sent in rebuttal to Peggy Hall's recommendation of no probable cause were being reviewed and that someone would get back to her. Also on November 10, 1999, Maurice Davis, the Chief Compliance Investigator at NERC, followed up with Geremia on Mr. Stewart's behalf with a letter informing Geremia that because she produced no new evidence, there was no basis upon which to overturn the Commission's initial recommendation of no probable cause.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment is a procedure which terminates, without trial, actions in which "there is no genuine issue as to any material fact and the the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A summary judgment motion may be

made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any," Id.

A movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)(quoting Fed.R.Civ.P. 56(e). In order to preclude a grant of summary judgment, the nonmoving party must do more than show that there is some "metaphysical doubt" as to the material facts. See Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). The court will view all underlying facts in the light most favorable to the non-moving party. See Martinez v. City of Los Angeles, 141 F.3d 1373, 1378, (9th Cir. 1998)(citing Matsushita Elec. Indus. Co. 475 U.S. at 587).

Although the non-moving party has the burden of persuasion, the party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. See Metro Indus.,Inc. v. Sammi Corp., 82 F.3d 839,847(9th cir. 1996). That burden is met by showing an absence of evidence to support the non-moving party's case. See Celotex Corp., 477 U.S. at 325. The burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. See Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). In meeting this burden, parties seeking to defeat summary judgment cannot rest upon allegations of denials of pleadings, but must demonstate a genuine issue for trial. See Brinson v. Linda Rose Joint Venture, 53 F. 3d 1044, 1049(9th Cir. 1995). Under 56(e), the adverse party must allege specific facts supported by affidavit that raise triable issues. See id. Affidavits that do not affirmatively

demonstrate personal knowledge are insufficient. See Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996).

IV. LEGAL ANALYSIS

A. Geremia's Civil Conspiracy Claim

A claim for civil conspiracy requires "a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damages results from the act or acts. Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1488-89 (1998).

Geremia's only mention of a conspiracy claim in her opposition states that "This court impeded discovery in regards to evidence on a conspiracy claim by dismissing NERC and IRS as defendants." Geremia does not even attempt to show that a material issue of fact exists for trial. The bare allegations contained in the Complaint are completely insufficient to withstand a motion for summary judgment. Thus, Colorado Belle's motion for summary judgment will be granted.

B. Geremia's State and Federal RICO claims.

To establish a federal RICO violation, a plaintiff must prove: 1) the existence of an enterprise which affects...commerce; 2) that the defendant associated with the enterprise; 3) that the defendant participated in the conduct of the enterprise's affairs; and 4) that the participation was through a pattern of racketeering activity." U.S. v. Phillips, 664 F.2d 971,1001(5th Cir. 1981).

The Court finds that is is unnecessary to do an exhaustive analysis of whether Geremia's Complaint could possibly make out a RICO violation. Geremia has completely failed to address Colorado Belle's arguments contending that it is entitled to summary judgment.

Geremia has produced no evidence whatsoever of a enterprise or evidence regarding the predicate act of mail fraud. Moreover, Geremia's misunderstanding of the tax

Regulations is insufficient to defeat a motion for summary judgment. Geremia has failed to show a genuine issue of fact exists, and summary judgment will be granted.

V. CONCLUSION

IT IS HEREBY ORDERED that Colorado Belle's Motion for Summary Judgment (#98) is GRANTED.

DATED this 11th day of October, 2001.

Kent J. Dawson
United States District Judge

App. 18

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA **D.C. No. CV-99-01703-KJD**
ORDER ENTERED AND SERVED Nov. 2, 2001

1. INTRODUCTION

This matter is before the Court on Defendants' Partial Motion for Summary Judgment (#99), Plaintiffs' Opposition (#106) and Defendants' Reply (#112).

II. FACTUAL BACKGROUND

Plaintiff Lynn Geremia has been a bartender at the Colorado Belle in Laughlin, Nevada since June 19, 1987. At that time, Geremia and two other bartenders earned $7.20 per hour, more than any other bartender. On June 13, 1998 each bartender with more than a year with Colorado Belle had their salary increased to $7.48 per hour pursuant to an automatic step increase plan. The next year the wages were increased to $7.67 per hour. Between February 1990 and February 1993 bartenders who had reached the top of their salary range did not receive an automatic step increases unless their salary range was extended. In February of 1993, Colorado Belle replaced the automatic step plan with a "Pay for Performance" program. If an employee met or surpassed the standards imposed by the guidelines of the program, they would then receive an increase in pay. The wage increases corresponded to an employee's performance appraisal. The performance appraisal measured areas including, quality of work, quantity of work, dependability, ability to get along with fellow workers, attitude, initiative, judgment, quest relations, dress and grooming, and punctuality/attendance.

In February 1994, Geremia and six others received a "meets standards" rating which entitled them to 4% wage increases. Four others received an "exceeds standards" rating which earned a 6% wage increase. The institution of

this program had the effect of Geremia and others earning less money than those with less seniority.

Along with her Equal Pay Act ("EPA") claim, Geremia asserts a claim of gender discrimination and retaliation. Geremia filed an official charge of discrimination with the Nevada Equal Rights Commission ("NERC") on April 22, 1999. The charge stated that the discrimination was based solely on wage disparities between Geremia and the male bartenders. The retaliation stems from a voluntary statement, made in November of 1992, that Geremia completed which indicated that she and a bar-back, Bill Littlefield, were having problems. Mr. Cecil Pettis, then Assistant Food & Beverage Director, sent a memo to both Geremia and Littlefield instructing them to be courteous with on another. Geremia subsequently filed a complaint that contained allegations that Littlefield committed an assault and battery against her in November 1993.

In February of 1999, Littlefield had been scheduled to work with Geremia at Geremia's assigned bar. However, the schedule was changed when Geremia complained that she did not want to work with Littlefield. After being denied the opportunity to work at the bar with the most volume at Colorado Belle due to Geremia's complaints, Littlefield sent several letters to management. Littlefield is the most senior bar-back at Colorado Belle, and after a discussion with management, he was assigned to work

The shooter bar on the next available opening. Geremia claims that this management action created a hostile work environment.

The NERC reviewed the information regarding Geremia's discrimination claim. Peggy Hall, the NERC investigator, informed Geremia that a recommendation of

no probable cause was going to be sent to the Administrator unless Geremia could produce additional evidence to support her claim. Geremia merely sent two additional letters to Peggy Hall reiterating that she had more seniority than other higher paid bartenders. The NERC officially closed the discrimination charge for insufficient evidence.

Before initiating this suit, Geremia requested and received a "Right to Sue" letter from the EEOC on the grounds that the "Pay for Performance" program was contrary to case law.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment is a procedure which terminates, without trial, actions in which "there is no genuine issue as to any material fact and the the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any," **Id.**

A movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)(quoting Fed.R.Civ.P. 56(e). In order to preclude a grant of summary judgment, the nonmoving party must do more than show that there is some "metaphysical doubt" as to the material facts. See Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). The court will view all underlying facts in the light most favorable to the non-moving party. See Martinez v. City of Los Angeles, 141 F.3d 1373, 1378, (9th Cir. 1998)(citing Matsushita Elec. Indus. Co. 475 U.S. at 587).

Although the non-moving party has the burden of persuasion, the party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. See Metro Indus.,Inc. v. Sammi Corp., 82 F.3d 839,847(9th cir. 1996). That burden is met by showing an absence of evidence to support the non-moving party's case. See Celotex Corp., 477 U.S. at 325. The burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. See Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). In meeting this burden, parties seeking to defeat summary judgment cannot rest upon allegations of denials of pleadings, but must demonstate a genuine issue for trial. See Brinson v. Linda Rose Joint Venture, 53 F. 3d 1044, 1049(9th Cir. 1995). Under 56(e), the adverse party must allege specific facts supported by affidavit that raise triable issues. See id. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. See Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996).

IV. LEGAL ANALYSIS

A. Geremia's EPA and Title VII Claims.

Geremia alleges claims under the EPA and Title VII for gender discrimination based on wage disparity. To establish a prima facie case of wage discrimination, a plaintiff must show that the employer pays different wages to employees of the opposite sex for substantially equal work. E.E.O.C. v. Maricopa County Community College District, 736 F.2d 510, 513 (9th cir. 1984). Once established, the burden of persuasion shifts to the employer to show that the wage disparity is permitted by one of the four statutory exceptions to the Equal Pay Act: "(I) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. 206(d)(1). Title VII incorporates the four

affirmative defenses of the EPA for discrimination based on equal pay. Gunther v. County of Washington, 623 F.2d 1303,1311(9th Cir. 1979).

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The evidence submitted in this case strongly suggests that the wage disparity is a result of Colorado Belle's Pay for Performance program. An employer can demonstrate that it allocates pay increases to its employees according to a "merit system" by showing "an organized and predetermined criteria." Maxwell v. Dity of Tuscon, 803 F 2d. 444,447(9th cir. 1986). Colorado Belle's program conducts annual performance appraisals of its employees. The appraisals consider factors such as quality of work, quantity of work, dependability, ability to get along with fellow workers, attitude, initiative, judgment, quest relations, dress and grooming, and punctuality. Geremia contends that the use of the appraisal form before implementation of the Pay for Performance program essentially invalidates the merit system used. To the contray, the continued use of the performance appraisals and the ability to compare preallegation performance appraisals brings a sense of legitimacy to Colorado Belle's system.

The EPA and Title VII precludes employer liability for wage differences based on a merit system. 29 U.S.C. 206(d). The Court finds that Colorado Belle's Pay for Performance program falls within the "merit system" exception of 29 U.S.C. 206(d)(ii). Geremia has produced no evidence to rebut this finding. As no genuine issue of facts exists, Colorado Belle is entitled to summary judgment on Geremia's EPA and Title VII wage disparity claims.

B. Geremia's Remaining Title VII Claims.

Colorado Belle contends that Geremia's allegations of gender discrimination cannot properly be considered by

this Court because the other claims exceed the scope of the original NERC charge and investigation. To establish federal subject matter jurisdiction, Geremia must exhaust her administrative remedies before seeking federal adjudication of her claims. E.E.O.C. v Farmer Bros.Co., 31 F. 3d 891,899(9th Cir. 1994). "The jurisdictional scope of a Title VII claimant's court action depends upon the scope to both the (NERC) investigation." Sosa v. Hiraoka, 920 F. 2d 1451, 1456 (9th Cir. 1990)(citing Green v. Los Angeles County Superintendent of Sch, 883 F.2d 1472,1476(9th Cir. 1989). This court has

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Jurisdiction over Geremia's other claims of gender discrimination if those claims fell withing the scope of the NERC's actual investigation of an investigation "which can reasonably be expected to grow out of the charge of discrimination. Sosa, 920 F.2d at 1456(citations omitted).

The charge of discrimination complains only of gender discrimination based on wage disparity. There is no mention of disparate treatment due to her gender and no mention of discrimination based on failure to promote. The Court finds that the scope of the investigation did not encompass the additional Title VII claims now alleged by Geremia. Accordingly, the Court does not have jurisdiction over these other claims. Therefore, Colorado Belle is entitled to summay judgment on Geremia's remaining Title VII claims.

It should be noted that this finding should not be construed to suggest that Geremia file another Charge of Discrimination with NERC or another lawsuit. A cursory examination of the allegations reveals that the claims are likely without merit.

C. Geremia's Retaliation Claim.

To establish a prima facie retaliation claim, Geremia must show (1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two. Payne v. Norwest Corp., 113 F.3d 1079,1080(9th Cir. 1997). Once established, the burden shifts to the employer to present legitimate non-discriminatory reasons for the adverse employment action. Brooks v. City of San Mateo, 229 F.3d 917,927 (9th Cir. 2000). Geremia must then demonstrate that a triable issue of fact exists as to whether the reasons advanced by the employer were pretextual. **Id.**

Colorado Belle does not dispute that Geremia's complaints to management constituted protected activity. Thus, the Court will first address Geremia's allegation that the assignment of Littlefield to the shooter bar is tantamount to retaliation. "Not every employment decision mounts to an adverse employment action." Strother v. Univ. of So. Calif. Permanente Med. Group, 79 F.3d 859,869(9th Cir. 1996). "An action is cognizable as an adverse employment action if its reasonably likely to deter employees from engaging in protected activity." Although

The evidence shows that Colorado Belle was aware of the nature of Geremia and Littlefield's relationship, there does not appear to be any retaliatory motive present. Colorado Belle avoided any interaction between Geremia and Littlefield in February of 1999 after receiving Geremia's complaints. It was not until Littlefield contacted management and met with his supervisors to discuss Colorado Belle's failure to schedule him at the shooter bar that he was later rescheduled to work there. It is Colorado Belle policy to allow the most senior employees to have preference in their workstations and work shifts. Moreover,

these events occurred prior to Geremia's filing of a charge of discrimination. Taking the evidence as a whole, Geremia has not demonstrated a genuine issue of material fact as to whether the assignment of Bill Littlefield to the shooter bar was retaliatory.

Next, the Court must consider whether the issuance of three warning slips to Geremia supports her retaliation claim. The Ninth Circuit has expressed concern that "employers will be paralyzed into inaction once an employee has lodged a complaint under Title VII, maiking such a complaint tantamount to a 'get out of jail free' card for employees engaged in job misconduct." Brooks, 229 F.3d at 928. The Court finds as a matter of law that the issuance of warning slips to Geremia does not constitute actionable retaliation. Thus, Colorado Belle is entitled to summary judgment.

The Court, having reviewed the papers and pleadings filed in this case, is of the opinion that most, if not all, of Geremia's claims lacked the evidentiary support required to maintain them. The Court is mindful of the fact that Geremia has proceeded without counsel. However, claims filed must be warranted by existing law whether or not a party has an attorney. Geremia is advised to carefully consider any future claims that she may wish to file to determine whether they may be meritorious.

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V. CONCLUSION

IT IS HEREBY ORDERED that Colorado Belle's Motion for Summary Judgment (#99) is GRANTED.

DATED this 30th day of October, 2001.

Kent J. Dawson

United States District Judge

App. 26

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA **D.C. CV-99-01703-KJD**
ORDER Entered and served April 22, 2002

This matter is before the court on Defendants' Motion for Attorney's Fees (#130). Plaintiffs have filed a Motion for Stay Pending Appeal to the 9th Circuit(sic.) of Appeals(#133). Defendants filed an Opposition to the Motion for stay (#134), and Plaintiffs filed a Reply (#135).

Plaintiffs filed a Complaint against the Defendants alleging sexual discrimination in violation of 41 U.S>C. 2000(e) *et seq.*, violations of the Equal Pay Act, state and federal RICO claims; and claims for intentional infliction of emotional distress and loss of consortium arising out of Lynn Geremia's employment at the Colorado Belle Hotel and Casino in Laughlin, Nevada. Defendants moved for summary judgment on all Plaintiffs' claims. The Court granted each of Defendants' motions for summary judgment, and the Clerk of Court entered final judgment in favor of Colorado Belle on November 2, 2001. Defendants now requests that the court award reasonable costs and fees based on their status as prevailing party, and the frivolous and unfounded nature of Plaintiffs' claims.

Defendants correctly assert that a district court may in its discretion award attorney's fees to a prevailing party in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). In Court Order #128 entered November 2, 2001, the Court made a finding that warrants an award of fees. "the Court, having reviewed the papers and pleadings filed in this case, is of the opinion that most, if not all, of Geremia's claims lacked the evidentiary support required to maintain them. The

court is mindful of the fact that Geremia has proceeded without counsel. However, claims filed must be warranted by existing law whether or not a party has an attorney."

The fact that Plaintiff's have received a jury award and a settlement from the Defendants in a previous case does not support Plaintiffs' assertion that the current case was not frivolous. In opposition to the present motion, Plaintiffs assert that Defendants' request for fees intends to interfere with Plaintiffs' pursuit of an appeal. Local Rule 54-16 requires a party moving for attorney's fees to file and serve a motion with the Court within 14 days of entry of final judgment or any other disposing of the action. Final judgment waas entered on November 2, 2001. The Court is within its discretion to award fees at this time. See Intel Corp. v. Terabyteinternational, Ind. 6 F.3d 614, 617 (9th Cir. 1993).

Plaintiffs state that nowhere has the Court alluded to an unreasonable, frivolous or lack of foundation for their claims, bat as demonstrated above, this is not the case. Not only should Defendants be awarded fees and costs as a prevailing party, the court has considered imposing sanctions for violations of Rule 11 of the Federal Rules of Civil Procedure. Morover, because the Court views the claims as frivolous, and the appeal taken in bad faith, Plaintiffs' motion for stay is denied. Defendants' motion for fees is granted.

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This Court is not inclined to grant Defendants' request for attorney's fees in the amount of $128,506.50 where only $46,765.00 of that amount was incurred after Defendants' offer of judgment. However, Defendants are entitled to a substantial award. Taking into consideration Plaintiffs pro se status, the Court orders that Defendants shall receive 50% of their requested fees or $64,253.25;

$9,913.74 in expert witness fees; and $9,861.91 in non-taxable costs for a total of $84,028,90.

V. CONCLUSION

IT IS HEREBY ORDERED that Colorado Belle's Motion for Attorney's Fees (#130) is GRANTED. The Clerk of Court shall award fees and costs in favor of Deefendants in the amount of $84,028.90.

IT IS FUIRTHER ORDERED that Plaintiffs' Motion for stay Pending Appeal to the 9th Circuit(sic) of Appeals (#133) is DENIED.

DATED this 16th day of April, 2002.

Kent J. Dawson

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORDER Entered and Served March 29, 2000

Before the Court is Plaintiffs' **Motion to Compel** (#8, filed February 3, 2000). Defendant Colorado Belle Corp.'s Opposition...(#17) was filed March 10, 2000. Plaintiff then filed their **Emergency Motion for Extraordinary (sic) Relief** and Motion in Reply to Defendant Colorado Belle's Opposition to Plaintiff's Motion to compel (#27,28) on March 21, 2000.

MOTION FOR EXTRAORDINARY RELIEF

Plaintiffs' Emergency Motion (#27) was, in effect, addressed and denied by Order (#30) of the chief presiding judge, the Honorable Johnnie B. Rawlinson, District Judge, on March 24, 2000, wherein Judge Rawlinson pointed out that a magistrate judge should disqualify himself where his impartiality might reasonably be questioned. These matters were referred to the

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Undersigned pursuant to that Order. The court does not find Plaintiffs' objection to the undersigned's qualifications to sit on this matter as being reasonable. Although the undersigned considers Judge Rawlinson's Order (#30) disparities, this Court feels compelled to correct some misunderstandings of the law apparently espoused by Plaintiffs, who are attempting to pursue this matter without the benefit of counsel. Those misunderstandings have apparently led Plaintiffs to conclude, incorrectly, that the Court harbors some sort of disposition against them or in favor of the Defendants in this matter.

Accordingly, the Court will attempt to address certain areas now argued by the Plaintiffs in their objections to a prior action of the court, before addressing the motion to compel.

The prior dispute arose out of a Notice of Taking Deposition of Plaintiff Lynn Geremia which was served on Plaintiffs by mail accompanied by a letter dated February 24, 2000. The deposition was scheduled in Las Vegas on March 13, 2000. Plaintiffs filed a Motion for Protective Order (#14) in the afternoon of March 7, 2000. Less than three judicial days before the deposition was to be taken, complaining that her residence was in Laughlin ant that she should not have to appear in Las Vegas, where the action is filed. When someone files a lawsuit in a certain place, it is expected that he or she will be required to submit to the taking of his or her deposition at the place where the lawsuit is filed, absent a showing of undue hardship. Ordinary expense of maintaining a lawsuit, is not considered "undue hardship." Incidently, Plaintiffs also argue that the deposition should be held on a Monday, because it was Lynn Geremia's day off. The court notes that the deposition was set on a Monday. Plaintiff also contended that the other Defendants might wish to depose her and be included in the Rule(f), Fed. R. Civ. P., meeting,

At the time of the deposition, the Court was uncertain whether there had been proper service of process on the other defendants. Furthermore, Defendant Nevada Equal Rights commission had already filed a motion to dismiss. It was unlikely that it would be interested in attending a deposition if it felt it would prevail on its motion. Likewiase, the Internal Revenue Service filed a motion to dismiss on the date set for the deposition.

As is the policy of the Clerk of Court, because it was a motion for protection, the motion was submitted immediately to the undersigned.

Plaintiffs now complain that the Court issued its order immediately without waiting for an opposition to be filed, implying that somehow that was unfair. The only

unfairness would be to Defendant Colorado Belle by denying it the opportunity to respond to the motion. Upon reading the motion, it was the court's opinion that the motion was without merit and, therefore, no response or opposition was necessary. Furthermore, had the Court waited for the standard time provided for an opposition to be filed, the deposition would already have taken place and the motion would be moot. In federal court, the filing of a motion for protection does not stay the deposition. Accordingly, Plaintiff would be faced with having to attend the deposition without knowing whether the motion would be granted. The court felt it was in the best interests of the plaintiffs, and in an effort to be fair with Plaintiffs, that it address the motion immediately so Ms. Geremia would know whether she had to appear. The need for the court to act immediately was caused by the action of Plaintiffs themselves in waiting until the eleventh hour to bring the motion even though they had known for two weeks that the deposition was set.

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Plaintiffs also now complain that Fed.R.Civ.P. 26(d) requires that the 26(f)(Fed. R.Civ.P.) meeting be conducted before discovery begins. Plaintiffs apparently did not read 26(d) and (f) carefully and are not familiar with the Local Rules. Rules 26(d) and (f) authorize the court, by order or by local rule, to opt out of this requirement. The district court of Nevada has done so as reflected in Local Rule LR 26-1(a). Accordingly, it is not required that the 26(f) meeting be conducted before discovery is commenced. In fact, Plaintiffs initiated discovery prior to that meeting by serving a Request for Production of Documents with the Complaint.

Plaintiffs now contend that "no good cause" was shown to take the deposition of Lynn Geremia or take it before the Rule 26(f) meeting. There is no requirement that

"good cause" need be shown. It is at the discretion of the party wishing to take a deposition, or seek any other method of discovery, when and by what method the discovery is to be conducted.

Plaintiffs now argue that the Defendant did not seek leave of court to notice the deposition. Leave of court is not required to take a deposition.

Plaintiffs now accuse the Court of threatening sanctions. If they will re-read this Court's order, thay will realize that the Court did not threaten sanctions, but merely acted to permit them to avoid the possibility of sanctions if they failed to appear without an order of protection authorizing them not to appear.

Plaintiffs also appear confused about what type of discovery is permitted and when. Under Local Rules, discovery may begin immediately. In fact the court encourages the parties to avoid delaying discovery, and Plaintiffs themselves served written discovery requests with the complaint, which they had the right to do. Plaintiffs also appear to be under the

Misunderstanding that written discovery requests (interrogatories or requests to produce documents) are not as formal as depositions. That is not the case. They are all part of the formal (as opposed to merely writing a letter and informally asking for some information) discovery methods available to all parties pursuant to the discovery deadlines issued by the Court. Answers or responses to interrogatories or requests to produce must be done under oath, just like a deposition.

Lastly, Plaintiffs now complain that Defendant's counsel, in setting the deposition, just wanted to take the deposition of Lynn Geremia so that by asking leading questions, and the use of exhaustive and diligent examination, he could get admissions from Lynn Geremia)on which to base a motion to dismiss). Plaintiffs are

undoubtedly correct in their assessment of Defendant's counsel's intentions, because that is not only his right, it is his duty on behalf of his client, and is the purpose and method of most depositions. The court expects no less. It certainly is not grounds for refusing to permit the deposition to go forward.

The foregoing is why this Court issued its order denying the motion for protective order and why it issued it as expeditiously as possible, in order that Plaintiffs would not be prejudiced in the face of uncertainty about whether to appear for the deposition. The court acted in that fashion, without giving the Defendant the opportunity to respond, in an effort to avoid prefudice to the Plaintiffs.

MOTION TO COMPEL

Plaintiffs First Request for Production of Documents was served on Defendant Colorado Belle at the time of service of the Complaint (which date was not provided in the motion). Defendant Colorado Belle asserts that it was served on January 4, 2000. The court, without information to the contrary, will assume that is so.

The Defendant responded to Plaintiffs' First Request for Production of Documents on February 18, 2000. Plaintiffs contend that the Defendant's response to Request No. 1 is insufficient because Defendant is only trying to protect itself from other lawsuits.

Request for Production No. 1 reads, "Any and all payroll records for bartenders since 1996 to present."

The Defendant's Response to Request for Production No. 1: reads, "Colorado Belle objects to this Request on the grounds that it is vague, over broad, and seeks to obtain documents which contain confidential information. Without waiving these objections, Colorado Belle, requests Plaintiffs enter into a stipulation regarding the confidentiality of such documents. After a stipulation regarding confidentiality has been entered into between

Lynn Geremia and John Geremia and counsel for Colorado Belle, and after agreements by Plaintiffs to limit their request appropriately, Colorado Belle will produce responsive documents."

Defendant opposes the motion on several grounds. The first is Plaintiffs' failure to comply with the requirement that a moving party, on a discovery issue, shall attempt to resolve the discovery dispute prior to filing the motion and, if is is unsuccessful in that attempt, to certify to the Court that it made the effort and what the effort was. *See* Fed.R.Civ.P.37(a)(2)(B). the effort must be a personal attempt to try to resolve the issue. Threats or threatening letters that if the offending party does not comply that a motion will follow is not enough. *See Shuffle Master, Inc. v. Progressive Games, Inc.* 170 F.R.D. 166, 170-173 (D.Nev.1996). It is correct that Plaintiffs failed to abide by this requirement. However, because they are acting in proper person, the Court is inclined to disregard this requirement on this occasion.

The Defendant also argues that Plaintiffs provided no points and authorities, in violation of Local Rule 7-2(d). While Plaintiffs' Points and Authorities may not meet the standards of points and authorities expected from attorneys-at-law, the court notes that an effort was made to provide points and authorities. It also notes that while there were 'points' attempted, there were no 'authorities' provided to justify Plaintiffs' position. Regardless, the court will consider the motion despite any shortcoming of the Points and Authorities.

Lastly, Defendants contend that Plaintiffs wanted the requested information for an improper intent (to rummage around the personal files of other employees to see whether Plaintiffs think other employees might also have a reason to sue Defendant) that it is an abuse of process and requests information that is irrelevant. The

Defendant contends that its response was proper and appropriate under the rules of discovery.

Plaintiffs contend that they have the right to look into other employees' files to see if there is anyone else offended who might want to join them or file their own lawsuit. Plaintiffs assert the 29 U.S.C. 2617(a) authorizes this effort. Plaintiffs' reliance on that statute is misplaced. That statute only authorizes employees to sue. It does not give one employee the right to examine the files of another employee without that employee's permission.

There are Supreme Court decisions which indicate that a litigant's interest in avoiding public disclosure of private information is grounded in the constitution itself.

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different Kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

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Whalen v. Roe, 429 U.S. 589,598-600 (1977).

> In *Nixon v. Administrator of General Services (*A.G.S.), 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), the Supreme court reaffirmed that "one element of privacy"is"the individual interest in avoiding disclosure of personal matters." 433 U.S. at 457, 97 S.Ct. at 2797 (quoting Whalen v. Roe, 429 U.S. 589, 599).

Tavoulareas v. Washington Post, Inc. 724 F.2d 1010,1019-1020. (D.C. Cir. 1984).

> The Fifth and Third Circuit Courts of Appeals have interpreted Whalen and Nixon as recognizing a constitutional right of confidentiality in personal matters.

Id. at 1020.

The custodian of private information, such as an employer who maintains personnel files on employees, has both a right and duty to resist efforts to unnecessarily or inappropriately disclose such information. *Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548, 551 n.2 (E.D.Cal. 1990). "[T]he initiation of law suit does not, by itself, grant plaintiffs the right to rummage unnecessarily and unchecked through the private affairs of anyone thay choose." Id. At 551.

Federal Rule of Civil Procedure 26(b)(a) provides that, "Parties may obtain discovery regarding any matter, not privileged, which is **relevant to the subject matter involved in the pending action...** "(Court's emphasis). Whether there are others who might have grounds to sue Defendant is **not relevant** to **Plaintiffs'** lawsuit. Furthermore, there may be personal information, in addition to social security numbers, that the other employees may not want anyone other than their employer to know. Plaintiffs' request, to produce all payroll records, is too broad and is irrelevant. But those questions were not asked. This was a request for production of personal records of Defendant's employees. Defendant has an obligation to protect those records from public exposure unless those employees consent otherwise.

Accordingly, for the reasons stated. It is hereby **ORDERED** that Plaintiffs' Motion to Compel (#8) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Extraordinary (sic) Relief (#27) is DENIED.

Dated: March 28, 2000.

Roger L. Hunt
U.S. Magistrate Judge